

(SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES CLASS ACTION FOR EQUITABLE RELIEF ONLY STARTS Page 14)

(PROVING THE EFFECTS OF PREJUDICE AND HATE STARTS Page 7)

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TERROR ON THE PLANT FLOOR—HATE CRIMES IN AMERICAN WORKPLACES

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I. INTRODUCTION

WORKPLACE HATE CRIMES ON THE RISE, BUT NOT A NEW PHENOMENON

This paper is meant to be a document that will generate discussion. It is hoped that the issues examined will heighten awareness about the growing epidemic of the phenomenon of racially hostile workplaces across the United States. In a July 10, 2000 issue of the New York Times (National),¹ EEOC reported that racial harassment charges have increased at alarming numbers over the last two decades, with the agency reporting that it received close to 50,000 such charges during the 1990's compared with roughly 10,000 charges in the 1980's. According to the article, hangman's nooses and racially charged graffiti are turning up in workplaces across the country. The article entitled: "Nooses, Symbols of Race Hatred, At the Center of Workplace Lawsuits," chronicles some of the most severe cases of racial hostility in American workplaces.

Among the most frightening forms of racial hostility in the workplace is the making of nooses. Nooses, which African American employees, associate with the brutal practice of lynching and the era of U.S. slavery, are found hanging in work areas, lockers or affixed to workplace walls. In other more life-threatening incidents, nooses were actually placed around African American employees' necks to terrorize them. These acts of terror often accompany signs and symbols of the presence of the Ku Klux Klan and other hate formations. They are among the most stark examples of racial hatred in the workplace. In its April 29, 1996 edition, Detroit News reported that a black manager at Ford Motor Company's Wixom plant found a hangman's noose near his office. The black supervisor considered the act to be a racist threat. Thus far, Ford officials have not been able to trace the origin of the hangman's noose.²

¹ "Nooses, Symbols of Race Hatred, at Center of Workplace Lawsuits," Sana Siwolop, New York Times (National), July 10, 2000.

² "Black Ford manager in Wixom finds noose hanging near office," Melinda Wilson, Detroit News, April 29, 1996.

Victims of workplace hate crimes often face difficult obstacles when seeking redress through the legal system. Plaintiffs are often blocked from going forward with their claims because of the stringent standard of proof some courts have required.³

The survival of the defendant's Motion for Summary Judgement has been particularly difficult for many plaintiffs in racially hostile workplace lawsuits. The test that must be met has proven to be quite strict and plaintiffs often don't prevail. For example, in *Bolden v. PRC, Inc.*,⁴ the Court affirmed an Order granting summary judgement in favor of the defendant holding that the plaintiff had to "show more than a few isolated incidents of racial enmity and that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." The plaintiff in this case stated that on one occasion a white co-worker told him: "You better be careful because we know people in the Ku Klux Klan." This is an example of the verbal abuse and harassing acts the plaintiff complained of. Despite the severity of the complaints, the plaintiff did not survive the Motion for Summary Judgement.

Through the discussion of cases involving some of the most disturbing forms of workplace racism, I hope to generate debate among ATLA lawyers as to the kinds of new and innovative strategies that may be employed in future actions. I also hope to persuade those at the private bar who may not currently be involved in litigating these types of cases, to consider doing so. The case study below presents an example of long-standing and pervasive racial hostility in an actual workplace. The events and occurrences are not unique; they mirror events occurring in workplaces and offices in small rural towns and large metropolitan areas.

In examining the cases presented in this paper, it is important to do so without any preconceived notions about areas where such events might occur more frequently than they occur in other areas. From Philadelphia, Pennsylvania to Gulfport, Mississippi workplace hate crimes have reached epidemic proportions.

II. A CASE STUDY ABOUT RACE HATRED IN A WORKPLACE

SHOWING OF A BRIEF SLIDE PRESENTATION DEPICTING GRAPHIC EXAMPLES OF RACIALLY HOSTILE GRAFFITI IN ONE WORKPLACE

The slides you have just seen were made from actual photographs of racist graffiti that appeared on walls inside Plant X. (The name of the Plant is being withheld because it is the subject of current litigation).

For more than three decades Plant X has been a hostile work environment for its African American employees. The plant is owned by a multi-billion dollar company and has a workforce of about 13,000 people. Of the 13,000+ employees, approximately 6,000 are African Americans.

³ "Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts," 1999 U Chi Legal F 277 (1999).

⁴ 43 F. 3d 545.

Everyday of their working lives, African American employees at Plant X are subjected to racial harassment, insults, threats and in some cases, physical abuse. They enter the plant and discover nooses hanging in conspicuous places. They use restrooms where racially charged graffiti covers the walls. Slogans like this one:

Kill all Niggers. Crime will drop 98%

were sited outside the restrooms as well. In fact, the life-threatening message quoted above, appeared on a wall just outside the suite of administrative offices in Plant X. An African American employee was walking to his work location, when suddenly a white forklift driver drove toward him, stopped and lowered a noose in front of him. Another African American employee had a noose placed around his neck by a white supervisor. When an African American employee walked into the company break room, he was told by a group of white employees:

Nigger, this room ain't for you.

On another occasion, another African American employee walked into the same break room and saw a white employee making a noose. When he stared at the person making the noose in disbelief, the individual said:

I'm gonna hang your black ass tonight

Because of the widespread nature of the racial hostility and abuse at Plant X, African American employees have on numerous occasions, complained to their supervisors and upper management. Their complaints fall on deaf ears and the practices continue unabated. White male supervisors use the same bathrooms that employees use and therefore, have seen racist graffiti and other offensive messages sprawled over the walls. Despite this first-hand knowledge, supervisors have failed to address the problem.

Many of the plaintiffs in a Title VII/Section 1981 lawsuit recently filed against Plant X, have worked at the plant for more than twenty years. These veteran employees, maintain that the Plant has always been a racially hostile workplace for blacks and other non-white employees. One employee remembers when he started working at Plant X back in 1966. The first day on the job, he went into the men's room and to his shock and amazement, there were racially charged messages of hate covering the walls in the stalls and on the walls leading into the bathroom. He was so incensed by what he saw that he went to one of his black co-workers and asked him if he had seen the bathroom walls; his co-worker stated: "Man that happens all the time."

Plant X is a place where white employees openly recruit members for the Ku Klux Klan. In fact, one of the messages on a wall in a bathroom reads:

Join you local Klan chapter today. Don't worry; there are four of them.

In addition to racial hostility and abuse, black employees are discriminated against when they apply for promotions. In fact, many of the plaintiffs in this case state that while they were more qualified than their white co-workers who were promoted, they did not get the promotion.

In many cases the black employees who were denied promotions, ended up training the whites who got promoted. Thus, the lawsuit alleges the existence of a hostile work environment and the systematic denial of promotions to qualified black employees.

While the lawsuit filed against Plant X is a Title VII action, it also alleges a violation of the Thirteenth Amendment. Though grossly underutilized in employment discrimination actions, the Thirteenth Amendment can be an important legal weapon in the battle against racial hostility in the workplace. The lawsuit filed on behalf of black employees at Plant X alleges that the widespread presence of racist graffiti, the siting of nooses and the verbal and physical abuse of black employees, are graphic examples of the badges or incidents of slavery prohibited by the Thirteenth Amendment:⁵

*When this amendment to the Constitution shall be consummated the shackle will fall from the limbs of the hapless bondman...Then scarred earth, blighted by the sweat and tears of bondage, will bloom again under the quickening culture of rewarded soil. Then the wronged victim of the slave system . . .impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, will . . .begin to run the race of improvement, progress and elevation.*⁶

To offer litigation models that utilize the full range of guaranteed protections, both statutory and constitutional, it is important to reconsider the Thirteenth Amendment as a weapon in the arsenal of tools for redress and repair of victims of racism in the workplace. The paucity of racial hostility cases that allege a Thirteenth Amendment violation, would suggest that there is a need to revisit its use in this area of litigation.

**Note: The Case Against Plant X was filed on March 21, 2001.

III. RECENT CASES

NOOSE PLACED AROUND AFRICAN AMERICAN WOMAN'S NECK CREATED A HOSTILE WORK ENVIRONMENT AND VICTIM SHOULD BE ALLOWED TO TAKE HER CASE TO TRIAL

In *E.B. Bell vs. Ingalls Shipbuilding Co.*,⁷ the Fifth Circuit Court of Appeals reversed a District Court's ruling which granted the defendant's Motion For Summary Judgment and remanded the case for trial. The Appellate Court agreed with the Plaintiff that she had been

⁵ See *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968). This case, while addressing issues of discrimination based on the denial of the right to own residential property, articulates the force of the Thirteenth Amendment as a remedy for eradicating the badges and incidents of slavery.

⁶ *Civil Rights Actions*, Cook-Sobiesky, New York, Matthew Bender and Company, Inc., 1999.

⁷ *Earlean Bell v. Ingalls Shipbuilding, Inc. and Tony Baggett*, 98-06353, 2000, U.S. App.

subjected to racial harassment and forced to work in a hostile work environment.⁸

1. The making of nooses in the workplace creates a racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended.
2. The act of placing a noose around a black person's neck is a racially hostile act in violation of Title VII of the Civil Rights Act of 1964, as amended.

_____ In 1996, an African American female, who worked at Ingalls Shipbuilding Company in Pascagoula, Mississippi, was kneeling down performing a work task when a white employee came up behind her and placed a noose around her neck and tightened it. The fair complected black woman sustained a red bruise around her neck. The woman associated the brutal attack with lynchings because a family member was lynched years ago.⁹ She filed a Title VII lawsuit alleging that she was the victim of a hostile work environment. The United States District Court of the Southern District of Mississippi, did not agree and granted the defendant's Motion for Summary Judgment. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the District Court's ruling and remanded the case for trial. In its opinion, the Fifth Circuit Court of Appeals used strong language to convey its contempt for what the plaintiff experienced at Ingalls:

The making of nooses is at least arguably objectively offensive, as it evokes the image of race-motivated lynching. In fact, there is evidence that it is this precise image that defendant Baggett intended to evoke. The frequent making of nooses, coupled with the presence of KKK graffiti in the work site raise a fact issue regarding whether the work atmosphere at Ingalls was racially hostile . . . There is evidence that the atmosphere was both objectively and subjectively abusive . . .

Accordingly the Court reversed and remanded for trial. Subsequently, the case settled at an undisclosed amount in September, 2000.

SAME ACTOR, SAME CONDUCT REQUIREMENT PREVENTED PLAINTIFF FROM PRESENTING EVIDENCE OF A RACIALLY HOSTILE WORK ENVIRONMENT

_____ This case came up on appeal when the District Court ruled evidence that would show the presence of a racially hostile work environment was inadmissible because it involved incidents that occurred outside the statutory period and because the acts complained of were not committed by the same actor nor did they represent the same conduct. The Plaintiff presented evidence to show that he and other African American employees at Philadelphia Electric Company (PECO) were subjected to racially harassing conversations, racially derogatory

⁸ *Andrews v. City of Philadelphia*, 895 F. 2d 1469 (1990).

⁹ *In The Matter of Color Race and The American Legal Process: The Colonial Period*, Higgenbotham, Jr., Leon, A., New York, Oxford University Press, 1978.

postings on a bulletin board, slurs and physical threats. Plaintiff sought to introduce evidence of a large noose hanging in the workshop entranceway and a picture of a Ku Klux Klan member posted in several locations throughout the workplace and a confederate flag painted on the side of a co-workers' helmet. One of the most graphic examples of the racial hostility complained of in this case was a "Klu Klux Klan Christmas Greeting Card which was handed to the Plaintiff by a white employee. The Court of Appeals held that the lower court erred in imposing a same actor, same conduct requirement and vacated the judgement and remanded the case for a new trial.¹⁰

BLACK EMPLOYEES SURVIVE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT--COURT SETS STANDARD FOR HOSTILE ENVIRONMENT CLAIMS

_____ In *Stephanie Walker; Nyree Preston vs. Cheryl Thompson; Don Kingston; Glasfloss Industries, Inc.*,¹¹ the United States Court of Appeals for the Fifth Circuit remanded in part defendant company, Glasfloss Industries' Motion For Summary Judgment because according to the Court, it failed to show as a matter of law that they exercised reasonable care in correcting the racially harassing behavior. In *Walker*, two African American women employees alleged that the defendant maintained a hostile work environment where they were the objects of offensive racial jokes, harassment, insults and hostility. When they complained to management, they were laughed at and ridiculed.

The Fifth Circuit held that, to survive a defendant's Motion for Summary Judgment on a hostile work environment claim, the appellant must create a fact issue on each of the elements of a hostile work environment claim: (1) racially discriminatory intimidation, ridicule and insults that are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working environment. See *DeAngelis v. El Paso Muni. Police Officers Association*.¹²

NOOSE FOUND IN FILIPINO WORKER'S LOCKER

1. Placing a noose inside a Filipino worker's locker after he complained about racial harassment created a hostile work environment and was a violation of Title VII of the Civil Rights Act of 1964, as amended.
2. Employer's failure to take action when a noose was placed in an employee's locker was a violation of Title VII of the Civil Rights Act of 1964, as amended.

_____ Settlement provides for a change in company policies to protect minority workers from workplace hostility. _

¹⁰ *James West, Appellant v. Philadelphia Electric Company*, 45 F. 3d 744.

¹¹ 99-10145, 2000, U.S. App.

¹² 51 F. 3d 591 (1995)

_____ In an action brought by the San Francisco office of EEOC ¹³ under Title VII of the Civil Rights Act of 1964, as amended, employee alleged that the defendant employer, Northwest Airlines, subjected him to national origin harassment on the basis of his being Filipino, creating an offensive, hostile, abusive and discriminatory work environment. When the plaintiff complained about being harassed because of his national origin, a noose was planted in his work locker.

This case settled on November 21, 2000. Through the settlement, the defendant agreed to update its anti-harassment and racial harassment policies. In addition, the defendant agreed to update its policy language to state that managers must take timely and appropriate action when they know or have reason to know that behavior which amounts to unlawful harassment or discrimination is occurring. The defendant also agreed to require all employees to attend anti-discrimination and harassment training twice during the effective term of the agreement. If an employee files an EEOC charge, the defendant company will conduct an internal investigation even if employee did not complain to management through the company's complaint process.

CONCLUSION

The growing number of complaints taken by EEOC and non-profit legal organizations, as well as members of the private bar, suggest that there is a need for more lawyers who are willing to represent victims of workplace racism.

PROVING THE EFFECTS OF PREJUDICE AND HATE

**BY: Attorney Sandra Jaribu Hill
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I. INTRODUCTION

_____ In March, 1997, at a plant in Leland, Mississippi, an African American male employee was the victim of a vicious attack. Four white male employees fastened him to a hoisting device and lifted him up into the ceiling where he was allowed to hang until he lost consciousness. His life was spared when one of the men felt guilty and returned to the scene and brought down the terrified man, who came within minutes of losing his life. Fearful of reprisals, including termination, the victim did not file an employment discrimination lawsuit. Instead, he sought relief under the Workers Compensation system. The victim sustained severe injuries which he still suffers from today.

_____ The incident described above, illustrates the severity of the problem of workplace hate crimes and prejudice. Because of the nature of these offensive acts, it often is difficult to separate the victims from those who witness these brutal attacks. The unlawful conduct creates

¹³ *Equal Employment Opportunity Commission v. Northwest Airlines, Inc.*, C 00-00039, 2000, MJJ U.S. Dist. Ct.

an atmosphere of fear and intimidation within the workplace. Racially hostile acts directed against individuals or groups are extremely destructive.

II THE PROBLEM

_____ Nooses in lockers, racist jokes and slurs, threats, harassment and racially motivated physical attacks, are daily occurrences in workplaces across the United States. These acts of bigotry and hatred take on many different forms, including single outrageous acts and continuous hostility. Thousands of lawsuits are filed every year by victims of workplace hate crimes. According to EEOC, 35% of all employment discrimination charges it received in 2001, were race-based charges. Of the total 80,840 charges filed, 28,912 were race-based. Race-based charges continue to be the largest single category of charges filed with the agency.¹⁴ Note: This alarming number of race-based charges includes those brought by individuals alleging denial of promotions, job steering and other forms of employment discrimination.

This paper is presented to encourage discussion among ATLA lawyers about the pitfalls and obstacles plaintiffs encounter when attempting to prove they are victims of prejudice, workplace hate crimes and racial harassment and thus are entitled to monetary damages. Through a brief discussion of select cases, the paper will examine some of the current trends in employment discrimination law that specifically address availability of recovery for victims of race-based hostile work environments.

As plaintiffs' lawyers representing individuals who come face to face with racial hatred and other forms of discrimination, while trying to make a living, we face many challenges. Perhaps the most difficult one is the survival of the defendant's Motion for Summary Judgment. Plaintiffs who overcome this barrier to obtaining relief, often must present evidence of a series of harassing incidents or show that a single act was so severe or outrageous, that their work environment was substantially affected by the act.¹⁵

RECENT CASES: CURRENT STATE OF THE LAW

_____ The following cases are presented to examine the legal standards applied by various Courts when determining whether plaintiffs have presented sufficient evidence to prove that they were subjected to a racially hostile work environment.

¹⁴www.eeoc.gov/stats/charges.html

¹⁵See *Cruz v. Coach Stores, Inc.*, 98-9654, 2000, U.S. App. where the Court reversed and vacated in part the defendant, Coach Store's Motion for Summary Judgment, holding that the plaintiff established a genuine factual dispute and that although the lower court characterized the harassment as occurring only on one occasion, plaintiff showed evidence that she and others were subjected to regular harassment. Note: The case was only remanded as to racially hostile work environment claims and not as to allegations of discrimination in promotions.

PLAINTIFF NEEDED TO SHOW MORE THAN “SPORADIC” INCIDENTS OF HARASSMENT TO SURVIVE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

_____ The plaintiff in *Bolden v. PRC, Inc.*,¹⁶ filed a lawsuit alleging that the defendant employer maintained a racially hostile work environment. To prove his case, plaintiff presented examples of the kind of harassment he experienced. Plaintiff testified as to incidents of name-calling and other forms of abuse. Despite plaintiff’s presentation of graphic examples that were racially charged, the District Court granted the defendant’s Motion for Summary Judgment, holding that the plaintiff had to show more than a few isolated incidents of racial enmity and that “instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.” To illustrate the severity of the harassment the plaintiff alleged he experienced, plaintiff stated that on one occasion, a white co-worker told him:

You better be careful because we know people in the Ku Klux Klan

On appeal to the U.S. Court of Appeals for the Tenth Circuit, that court affirmed the lower court’s ruling, holding that the plaintiff failed to present evidence of a “steady barrage of opprobrious racial comments”.

PLAINTIFFS WHO SHOWED EMPLOYER FAILED TO EXERCISE REASONABLE CARE IN CORRECTING HARASSING BEHAVIOR SURVIVED THE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

_____ In *Stephanie Walker; Nyree Preston vs. Cheryl Thompson; Don Kingston; Glasfloss industries, Inc.*,¹⁷ plaintiffs, two African American women employees, alleged that the defendant maintained a hostile work environment where they were the objects of offensive racial jokes, harassment, insults and hostility. In their complaint, plaintiffs alleged that when they complained to their employer, they were laughed at and ridiculed.

In reversing the District Court’s decision, the Fifth Circuit Court of Appeals, held that to survive a defendant’s Motion for Summary Judgment on a hostile work environment claim, the appellant must create a fact issue on each of the elements of a hostile work environment claim: (1) racially discriminatory intimidation, ridicule and insults that are; (2) sufficiently severe or pervasive that they; (3) alter the conditions of employment; and (4) create an abusive working environment.

WHERE LOWER COURT FAILED TO CONSIDER ALLEGATIONS OF A RACIALLY HOSTILE ENVIRONMENT IN LIGHT OF ALL CIRCUMSTANCES AND INSTEAD VIEWED THEM AS SEPARATE INCIDENTS, GRANT OF DEFENDANT’S JUDGMENT AS A MATTER OF LAW WAS REVERSED

¹⁶43 F.3d 545

¹⁷99-10145,2000, U.S. App.

Jackson v. Quanex Corp.,¹⁸ was a case involving an African American employee who alleged that she and other African American co-workers, as well as other minorities, were subjected to repeated instances of racial harassment and discrimination. In her complaint, plaintiff described in great detail, numerous incidents of racial harassment, which she witnessed or experienced. Plaintiff also stated that she regularly saw racist graffiti in the women's rest room, depicting a male and a female and accompanied by comments comparing the penis sizes of white and black males. She also stated that she learned about even more severe forms of racist graffiti found in the men's bathrooms, including: images depicting lynchings and phrases like: "KKK is back." During trial, the District Court ruled inadmissible much of the evidence plaintiff presented about various acts of racial harassment experienced by her co-workers, as well as the defendant's response to such occurrences. On appeal in the United States Court of Appeals for the Sixth Circuit, the Court reversed the judgment of the district court and remanded the case for a new trial on appellee's hostile work environment claims.

____ Similarly, in *McGowan; Luna; Guerrero v. All Star Maintenance, Inc.*,¹⁹ plaintiffs complained that over the course of their employment as painters with the defendant company, they were the constant victims of racial harassment, name-calling and unprovoked epithets and were wrongfully terminated when they complained about the racial hostility at All Star. At trial, the defendant challenged plaintiffs' evidence of racially derogatory comments, attributing the language and insults to the "coarse dominions of the construction industry." Further, the defendant maintained that while statements like "wannabe cholos," "fucking stupid Mexicans," "my south of the border friend" and "nigger for a day," might have been made, they were not always spoken directly to plaintiffs and because plaintiffs only spent a few minutes in the office each day where some of the offensive language may have been uttered, plaintiffs could not establish the factual showing necessary to prove their hostile work environment claims. Relying upon this analysis, the District Court granted summary judgment on grounds that the work environment could not have been as offensive and racially hostile since plaintiffs only were subjected the treatment for a few minutes a day and only worked for the defendant company for three weeks.

In reversing and remanding the District Court's ruling in *McGowan*, the Appellate Court held that the District Court erred in granting the defendant's Motion for Summary Judgment, without first examining the totality of circumstances, including the context in which the alleged incidents occurred.²⁰

See also *Bell v. Ingalls Shipbuilding Company*,²¹ where the Fifth Circuit Court of

¹⁸98-1515, 1999, U.S. App.

¹⁹00-2040, 2001, U.S. App.

²⁰See also *Whidbee; Tranquille v. Garzarelli Food Specialists, Inc.* 99-9470, 2000, U.S. App. where the U.S. Court of Appeals for the Second circuit, reversed the District Court's ruling granting defendant's Motion for Summary Judgment holding that plaintiffs presented sufficient evidence of a hostile work environment and of employer liability to survive summary judgment.

²¹98-06353, 2000, U.S. App.

Appeals reversed a District Court's ruling which granted the defendant's Motion for Summary Judgment and remanded the case for trial. The appellate court agreed with the plaintiff, who filed suit after a white male employer placed a noose around her neck and tightened it, that she had been subjected to racial harassment and forced to work in a hostile work environment.

THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO ALLOW A REASONABLE JUROR TO CONCLUDE THAT THE DEFENDANT AUTHORIZED OR ENCOURAGED UNLAWFUL HARASSMENT

 In *Stanley D. Dowd and Richard Brown, Jr., Appellees v. United Steelworkers of America, Local No. 286, Appellant*²², the U.S. Court of Appeals for the Eighth Circuit, affirmed a district court's ruling, holding that evidence at trial showed that epithets were shouted at plaintiffs as they crossed the picket line, and that white employees were not subjected to the same kind of treatment when they crossed the picket line. Further, the Court found that a reasonable juror could have determined that the union failed to take proper remedial actions to end the harassment. The Court found that further evidence presented at trial, showed that union stewards were not only present during the name-calling, but were actually standing among those shouting racial epithets.

Plaintiffs were each awarded \$10,000 in compensatory damages for emotional distress. The defendant union filed a motion to "conform the verdict", arguing that its compensatory-damages liability was capped at zero, pursuant to 42 U.S.C. Sect. 1981a (B)(3)(a), and that it should receive a set-off in the amount of Goodyear's settlement with plaintiffs. The appellate Court affirmed the lower Court's ruling on this issue, holding that since the jury was instructed to render a damages judgment based solely upon what the jury determined to be the union's conduct, to allow the union to receive credit in the amount of the employer's settlement, would result in plaintiffs being awarded less than full recovery.

A TRIABLE ISSUE IS RAISED AS TO HOSTILE WORK ENVIRONMENT WHERE SUPERVISOR VERBALLY ASSAULTED AFRICAN AMERICAN EMPLOYEE WITH PHYSICALLY HUMILIATING COMPARISONS TO "MONKEYS" AND SLAVES

Plaintiff Spriggs filed suit in the United States District Court for the District of Maryland, at Baltimore, alleging that during his employment with Diamond Auto Glass, he was the victim of "incessant racial slurs, insults and epithets."²³ At trial, plaintiff presented evidence showing how his manager, a white male, on numerous occasions, taunted, vilified and insulted him. Plaintiff stated that his manager called him "nigger" and "monkey" and referred to other African American employees in a similar manner. The hateful conduct of the manager also was unleashed on African American customers. Additionally and even more shocking, this same manager called the plaintiff's wife a "black bitch."

²² 00-2424NE, 2001, U.S. App.

²³99-2393, 2001, U.S. App.

Despite evidence that the manager's behavior was severe and constant, the District Court granted the defendant employer's Motion for Summary Judgment on grounds that the affidavit evidence of the plaintiff's complaint was inconsistent with his deposition testimony. In vacating the district court's judgment and remanding the case for a new trial, the Court held, as it did in *Rohrbough v. Wyeth Laboratories, Inc.*,²⁴ that while it is true a party against whom summary judgment is being sought cannot create a jury issue by identifying discrepancies in his own account of the facts, and that such contradictory statements would render the party vulnerable to summary judgment, there must be a bona fide inconsistency. Distinguishing the facts in *Spriggs* from *Rohrbough*, the Court did not find that the plaintiff had presented facts in his affidavit that were substantially inconsistent with those set forth in his deposition.

REASONABLE PERSON STANDARD APPLIED WHERE COURT OF APPEALS AFFIRMED THE LOWER COURT'S RULING GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

*Sweezer v. Michigan Department of Corrections*²⁵ was a case where plaintiff alleged that she was the victim of racial and sexual harassment because as an African American woman officer, she was repeatedly countermanded by her white male subordinates. Additionally, plaintiff alleged that not only were African American officers subjected to this discriminatory treatment, but so were African American prisoners who also were the objects of racial hostility and called "niggers" by white male guards and supervising officers.

One of the most graphic examples of the ongoing harassment plaintiff described at trial involved an incident where plaintiff walked into a local restaurant and encountered a white fellow officer, who upon seeing her, remarked: "Hey, there's a new colored woman in town." Two weeks later, while in the plaintiff's presence, defendant Allen told officers she was in charge of, what he had said to her in the restaurant. Several months later, plaintiff took disciplinary action against this same individual for abusing an inmate. At the disciplinary conference, the union representative suggested that plaintiff Sweezer took action against Allen in retaliation for his comments. For a substantial period of time after Allen's disciplinary conference, he and his friends harassed the plaintiff by calling her "bitch" and "nigger" and making other racist and sexist remarks.

When plaintiff complained to the Deputy Warden, a white female, about the racially hostile work environment she was forced to work in, the Deputy Warden responded that she "hated to admit it, but they have a lot of red necks and cowboys who work there."

In affirming the District Court's ruling, the Appellate Court held that the Court did not err in granting summary judgment to defendants because a reasonable person in the plaintiff's shoes could not conclude that the race-based incidents, caused by either co-workers or supervisors, were sufficiently severe and pervasive to create an intolerable working environment.

²⁴916 F.2d 970

²⁵99-1644, 2000, U.S. App.

JUDGMENT AS A MATTER OF LAW DENIED WHERE EMPLOYER FAILED TO CORRECT HOSTILE WORK ENVIRONMENT

In *EEOC v. Harbert-Fed. Express Corp.*,²⁶ plaintiffs, who were male employees, contended that the defendant employer allowed them to be subjected to unwelcome and offensive touching on the basis of sex and failed to take corrective action, creating a hostile work environment. The District Court denied the defendant's Motion for Judgment As a Matter of Law with respect to one plaintiff, holding that defendant employer failed to take corrective actions that were reasonably calculated to end the harassing behavior. As to the other plaintiff, the Court found there was no error because EEOC failed to show that the employer knew or should have known of the harasser's behavior towards the second plaintiff.

CASE UPDATE—BAD NEWS FOR VICTIMS OF WORKPLACE HATE AND PREJUDICE

During last year's ATLA convention in Montreal, I presented a paper entitled "Terror on the Plant Floor—Hate Crimes in American Workplaces. In that paper, I offered a case study describing conditions in Plant X where more than 100 individuals sought class certification to obtain relief as victims of a racially hostile work environment. Since that paper was presented, we recently learned that the District Court judge granted the defendant's Motion to Dismiss critical claims alleged in the complaint. Among the claims dismissed from this lawsuit were two of the party defendants, the organizational plaintiff, the Thirteenth Amendment and Title VI claims and all claims related to class action relief. Note: The defendant's Motion to Dismiss was granted prior to plaintiffs having the opportunity to do any discovery to further substantiate their claims against the defendant. As a result of the District Court's ruling, eleven (11) of the plaintiffs (named as class representatives) remain in the suit, now against one defendant. The District Court's ruling in this case was based on the Fifth Circuit's rulings in the infamous *Allison v. Citgo Petroleum Corp.*, 99-30489, 1998, U.S., App., and *Smith v. Texaco*, 263 F.3d 394, 408 (5th Cir. 2001), where the Court held that where claims for compensatory and punitive damages predominate over any request for declaratory relief, a class under Rule 23 (b)(2) cannot be certified. The judge by guided by *Smith* and *Allison*, held that damages prayed for must be incidental to injunctive or declaratory relief for discrimination to warrant class-wide recovery. This line of cases poses serious problems for potential class plaintiffs in the Fifth Circuit.

In various circuits, there is considerable debate about the availability of class action relief for victims of racially hostile work environments and other forms of employment discrimination.²⁷ Recent decisions suggest that plaintiffs are finding it more and more difficult to survive summary judgment when alleging class-wide claims. See *Brian Murray et al v. Rent-A-Center*,²⁸ where plaintiffs alleged that the class members were subjected to racially

²⁶00-5150/00-5232, U.S. App.

²⁷See *Charles Robinson, et al v. Metro North Commuter Railroad Co.*, 00-9417(L), 00-9423, U.S., App., where the U.S. Court of Appeals for the Second Circuit vacated a District Court's order holding that the Court erred in applying the incidental damages standard to deny employee's request for class certification of the pattern-or-practice treatment claim.

²⁸00-0573-CV-W-4-ECF, 2001, U.S. Dist.

discriminatory work environments regarding pay and promotion. The District Court denied plaintiffs' motion for class certification, holding employee plaintiffs failed to present sufficient evidence to support a pattern or practice of discrimination common to all class members and thus, certification was not warranted.

As the debate on the availability of class-wide relief for victims of employment discrimination, rages on, the lack of uniformity in outcomes is worth considerable attention. Circuit splits on this issue may have a profound impact on what will surely be an uphill battle for plaintiffs who seek class relief for employment discrimination.

There is a network of plaintiffs' lawyers who are planning a legal round table discuss to the problems encountered in seeking class action relief for victims of employment discrimination in various circuits. If you are interested, please see the presenter at the end of the program.

Hate crimes in the workplace are a microcosm of those occurring in the larger society. Victims need prompt redress. To insure adequate governmental responses to this serious problem, there is a need to explore legislative remedies through the enactment of state and federal bills that specifically address **HATE CRIMES IN THE WORK PLACE**.

Plaintiffs in the Plant X case are preparing to appeal their case in the Fifth Circuit. Stay tuned!

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE

RELIEF AND DAMAGES

CLASS ACTION FOR EQUITABLE RELIEF ONLY

(Civil Rights-Employment)

(Class Action)

Jury Trial Demanded

PRELIMINARY STATEMENT

1. This action seeks, *inter alia*, injunctive and declaratory relief to prevent continuing, serious, and unjustified race discrimination by the employer NORTHROP GRUMMAN SHIP SYSTEMS, INC. (hereinafter "NGSS" or "NGSS and/or its predecessor(s)") with regard to the selection appointment process, retention, terms and

conditions of employment, treatment, and promotion of Black employees at NGSS and/or its predecessor(s). The practices complained of above are violations of the civil rights laws of the United States and also are violations of international standards of human rights as defined in the International Covenant on the Elimination of Racial Discrimination as well as other international laws. In addition to class and individual equitable relief, plaintiffs seek, on an individual basis, compensatory and punitive damages for injury suffered as a result of defendant's illegal employment practices. This Second Amended Complaint is filed, *inter alia*, in response to this Court's judgment, entered February 28, 2002, wherein the Court granted defendant's motion to dismiss plaintiffs' class action allegations based on this Court's reading of the effect of the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). This Second Amended Complaint is further necessitated by this Court's dismissal of the following causes of action and parties from the First Amended Complaint in that judgment:

- a) Dismissal of the class action allegations seeking compensatory and punitive damages;
- b) Dismissal of the claim for relief alleged pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*;
- c) Dismissal of the claim for relief alleged pursuant to the Thirteenth Amendment to the U.S. Constitution;
- d) Dismissal of organizational plaintiff INGALLS WORKERS FOR JUSTICE;
- e) Dismissal of defendant LITTON INDUSTRIES; and
- f) Dismissal of defendant NORTHROP GRUMMAN.

2. Moreover, the Plaintiffs and the Court have been informed that the remaining defendant from this Court's February 28, 2002 judgment has undergone an official name change from INGALLS SHIPBUILDING COMPANY to NORTHROP GRUMMAN SHIP SYSTEMS, INC., and this Second Amended Complaint reflects that name change.
3. Finally, one new plaintiff-intervenor, Norman R. Tinsley, is added in this Second Amended Complaint after being inadvertently left out of the Complaint in Intervention, and the name of one of the representative Plaintiffs, Curtis L. Harville, is corrected.

JURISDICTION

4. This suit is authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 2000e-5(f); 28 U.S.C. § 1343(a)(3), (4); 28 U.S.C. § 1331; and 28 U.S.C. § 1337. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202.

PARTIES

PLAINTIFFS

5. Brian Thompson, Terry Street, John Powe, Rebecca Sims Lewis, Odell Hudson, Frank Bridges, William Carmichael, Curtis L. Harville, Roger Johnson, Herman Smith, and Nelva Holifield are either current or former Black employees at NGSS and/or its predecessor(s). These plaintiffs bring this action on behalf of themselves and all others similarly situated. They are informed and believe, and thereon allege, that defendant has engaged

in, and continues to engage in, a pattern and practice of unlawful employment practices, including, but not limited to the following, with the purpose and effect of denying equal employment opportunities to plaintiffs, and those similarly situated:

- a) failing to promote plaintiffs at the same rate as White employees;
- b) demoting plaintiffs at a higher rate than White employees;
- c) selecting plaintiffs for lay-offs during reductions in force at a higher rate than White employees;
- d) compensating plaintiffs at a lower rate than White employees;
- e) denying plaintiffs training opportunities that are disproportionately made available to White employees;
- f) denying plaintiffs certain benefits, including, but not limited to, participation in sea trials and other trips that are disproportionately made available to White employees;
- g) assigning plaintiffs to dirtier, more difficult, more dangerous, and less desirable jobs than White employees;
- h) forcing plaintiffs to work with injuries without accommodation or without provisions being made for medical restrictions;
- i) maintaining a racially hostile work environment at NGSS and/or its predecessor(s) by allowing plaintiffs to be subjected to viewing racially derogatory graffiti in various rooms and work areas at NGSS and/or its predecessor(s); finding nooses in various rooms and work areas at NGSS and/or its predecessor(s); being physically attacked while working at NGSS and/or its predecessor(s); hearing racially derogatory jokes at NGSS and/or its predecessor(s); and being subjected to racially derogatory harassment orally and in writing at NGSS and/or its predecessor(s); and
- j) retaliating against plaintiffs due to complaints filed about the above unlawful employment practices, membership in plaintiff Ingalls Workers For Justice (IWFJ), or involvement in this lawsuit.

PLAINTIFFS-INTERVENORS

6. Ernest Anderson, Gail Anderson, James E. Anderson, Collum L. Andrews, Sr., S.J. Baldwin, Autrey E. Barney, Anthony Bates, Johnny Bell, Catherine Benn, Larry Bennett, Tom Blackwell, Middie Blake, Marion Blanks, Garry J. Bogan, Alma A. Bolton, Nan Bolton, Jr., Nolan Bridgewater, Aaron Brown, Delauris D. Brown, Nathaniel Brown, Precilla Brown, Earnest Buckhalter, Arthur E. Burney, Rochell Campbell, Ruby S. Campbell, Donny R. Campbell, Sr., Lasalle Carmichael, Lee R. Clark, Benjamin Coleman, Bennie L. Coleman, Johnny Colvin, Robert A. Combest, Joyce B. Cook, Towanna Covan, Todd D. Culberson, Jimmie L. Dailey, Bruce Davis, William O. Davison, Eugene G. Dickey, Jr., Andrew Dickinson, Helen Earl, Bennie E. Edwards, Theodore R. Edwards, Ednearl F. Epps, Annie Fairley, Joe Fairley, Leo C. Fairley, Jr., Linda Fairley, Mary Fairley, Lavaron Fantroy, Roosevelt Farmer, Fred E. Fleming, Sr., Adrian E. Floyd, Nellie C. Franklin, Rebecca M. Garner, Valerie Garry, Carroll D. Gayle, John R. Goff, Laura B. Graves, Ronald E. Green, Will I. Gregory, Sr., Almita Harper, Thomas G. Harris, Roy J. Hawkins, Renarda Hayes, Almetis Haynes, Lish Holloway, O.N. Hoskins, Gregory T. Hughs, Bobby J. Hunter, Gregory C. Hyde, Paul E. Irving, Ana Jackson, Melva M. Jackson, Helen J. Joe, Marvin Johnson, Frankie Jones, James A. Kelly, Roy Keys, Willie Kinnard, Joe S. Kirkland, Willie Kirkland, Charles Lee, Lewis Lett, [FNU] Lewis, Tammy Liddell, Benjamin F. Locke, Jr.,

Janice Lott, Barbara N. Love, James E. Love, Arthur Mason, Doris P. McCann, Macie McMillan, Larry McNair, James Mingo, Patricia Mingo, Calvin Mitchell, Alvin Moore, Charles D. Moore, Willie Moore, Carla D. Nettles, Daisan A. Nettles, W.H. Newman, Lawrence Packer, John Parrish, Beatrice D. Perryman, Rosie S. Poindexter, Doris A. Poole, Gwendolyn R. Powell, Thomas E. Rankin, Willie Ransom, Jimmie L. Reed, Keith Reed, Cecil Reid, Donald Richardson, Willie B. Richmond, Nadine Roberson, Betty N. Rogers, Anthony Rudolph, George W. Rudolph, Larry Rudolph, Spencer Ruggs, William H. Sampson, Jr., Charlie Sanderson, Jr., Joseph M. Sewell, Delois Simmons, Joe E. Simmons, Jr., Roger Smith, Yvonne M. Stafford, Leala Stallings, Williard Stallings, Eddie Stanton, Shirley J. Stanton, John M. Steele, Reginald M. Steele, Bessie Stephens, Tommie L. Stevenson, Charles Street, Don A. Street, John Street, Omie H. Sutherland, Harold L. Taylor, Beverly Thibodeaux, Gwendolyn Thigpen, Lester Thomas, Ronald Thomas, Johnny Thompson, Norman Thompson, Norman R. Tinsley, Edna M. Tubbs, Lily B. Tucker, Annie E. Turner, Catrina Walker, Samuel Walley, Mary Walsh, Bernisteen Ward, Bobby J. Ward, Louise F. Watkins, Samuel L. Webster, Lebaron Weston, Reginald Whisenhunt, Tara L. Wiley, Amos Williams, Bennie E. Williams, Carl F. Williams, Frederick Williams, Sharon Willis, Shurna Winbush, Robert Wise, Luther Woodland, Amos L. Wright, and Wayne E. Zimmerman, Sr. are current or former Black employees at NGSS and/or its predecessor(s). They were putative class members as described by the First Amended Complaint. They are informed and believe, and thereon allege, that defendant has engaged in, and continues to engage in, a pattern and practice of unlawful employment practices, including, but not limited to the following, with the purpose and effect of denying equal employment opportunities to plaintiffs-intervenors:

- a) failing to promote plaintiffs-intervenors at the same rate as White employees;
- b) demoting plaintiffs-intervenors at a higher rate than White employees;
- c) selecting plaintiffs-intervenors for lay-offs during reductions in force at a higher rate than White employees;
- d) compensating plaintiffs-intervenors at a lower rate than White employees;
- e) denying plaintiffs-intervenors training opportunities that are disproportionately made available to White employees;
- f) denying plaintiffs-intervenors certain benefits, including, but not limited to, participation in sea trials and other trips that are disproportionately made available to White employees;
- g) assigning plaintiffs-intervenors to dirtier, more difficult, more dangerous, and less desirable jobs than White employees;
- h) forcing plaintiffs-intervenors to work with injuries without accommodation or without provisions being made for medical restrictions;
- i) maintaining a racially hostile work environment at NGSS and/or its predecessor(s) by allowing plaintiffs-intervenors to be subjected to viewing racially derogatory graffiti in various rooms and work areas at NGSS and/or its predecessor(s); finding nooses in various rooms and work areas at NGSS and/or its predecessor(s); being physically attacked while working at NGSS and/or its predecessor(s); hearing racially derogatory jokes at NGSS and/or its predecessor(s); and being subjected to racially derogatory harassment

orally and in writing at NGSS and/or its predecessor(s); and

- j) retaliating against plaintiffs-intervenors due to complaints filed about the above unlawful employment practices, membership in plaintiff Ingalls Workers For Justice (IWFJ), or involvement in this lawsuit.

DEFENDANT

- 7. NORTHROP GRUMMAN SHIP SYSTEMS, INC. is a business that is engaged in the construction and refurbishing of seagoing vessels, both military and civilian. It is located in Pascagoula, Mississippi. It is the successor in interest of Ingalls Shipbuilding Company. It is an employer for purposes of Title VII of the Civil Rights Act of 1964, as amended.

CLASS ACTION ALLEGATIONS

- 8. This action is brought by plaintiffs as a class action pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure on behalf of themselves and the following persons:
 - a) All past and present Black employees with NGSS and/or its predecessor(s) who have applied for promotions and have been informed that they are or were qualified for the positions but were not selected for the position that unlawfully went to a White employee;
 - b) All past and present Black employees with NGSS and/or its predecessor(s) who have applied for promotions and have not been informed that they are or were qualified for the positions and were not selected for the position that unlawfully went to a White employee;
 - c) All past and present Black employees with NGSS and/or its predecessor(s) who have not applied for promotions within the appropriate limitations period because they felt that such applications would be futile and therefore were not selected for the position that unlawfully went to a White employee;
 - d) All past and present Black employees with NGSS and/or its predecessor(s) who have been promoted to a supervisory position, only to be demoted following their promotions due to reductions in workforce, unlike White employees with less seniority and experience who were either promoted during or re-promoted after these reductions;
 - e) All past and present Black employees with NGSS and/or its predecessor(s) who have suffered disparate treatment in comparison to the treatment of White employees.
 - f) All past and present Black employees with NGSS and/or its predecessor(s) who have experienced retaliation due to their involvement with Ingalls Workers For Justice (IWFJ), their involvement in the filing of charges with the Equal Employment Opportunity Commission, filing and/or participating in this lawsuit, or their own efforts to fight the discriminatory practices of NGSS and/or its predecessor(s);
 - g) All past and present Black employees with NGSS and/or its predecessor(s) who have been subjected to a racially hostile atmosphere by having to view racist graffiti in rooms and work areas at NGSS and/or its predecessor(s);
 - h) All past and present Black employees with NGSS and/or its predecessor(s) who have been subjected to a racially hostile atmosphere by having been called “Nigger” or other racist epithets, or heard racist jokes, or been threatened by White employees because of their race on numerous occasions;
 - i) All past and present Black employees with NGSS and/or its predecessor(s) who have been subjected to a

racially hostile atmosphere by having nooses either placed around their necks or located in their work areas; and

- j) All past and present Black employees with NGSS and/or its predecessor(s) who were not given opportunities for training at a rate equal to White employees and then were denied promotions and other opportunities on that basis.
9. Each sub-class is so numerous that joinder of all parties is impracticable. Upon information and belief, the number of Black employees deemed to be qualified for promotions and not selected and having the jobs going to White employees is in excess of 40 employees; the number of Black employees who have not received information as to their being qualified for promotions and not selected is in excess of 40 employees, and the number of Black employees who were deterred or considered applying for promotions to be futile is in excess of 40 employees.
10. Upon information and belief, the number of Black employees who have viewed the racist graffiti and have been called “nigger” or other racist epithets, or been subjected to racist jokes and racist threats in the work place, is in excess of 40 employees. Additionally, upon information and belief, the number of Black employees who have found nooses in their work area or who have had nooses placed in their work areas or around their necks is in excess of 40 employees.
11. There are questions of law and fact common to the appropriate sub-classes. The common questions include but are not limited to the following:
 - a) Whether the selection processes used by NGSS and/or its predecessor(s) for promotions are non-discriminatory and job related;
 - b) Whether defendant uses unvalidated selection procedures, standards, policies, and practices which unlawfully operate to deny qualified Black applicants promotions at NGSS and/or its predecessor(s);
 - c) Whether defendant uses promotional standards, policies, and procedures, which unlawfully deny qualified Black employees equal opportunities for promotions because of their race and color;
 - d) Whether the terms, conditions, and privileges of employment at NGSS and/or its predecessor(s) result in harassment and disparate treatment on the basis of race;
 - e) Whether the continuing use of selection devices and procedures with an adverse impact on Black employees constitutes intentional discrimination; and
 - f) Whether the propagation of racist graffiti, the placement of nooses in work areas and around Black employees’ necks, and the continued use of the word “nigger” and other racist epithets by White employees constitutes a racially hostile atmosphere.
12. The claims of plaintiffs are typical of the claims of the appropriate sub-classes.
13. Plaintiffs will fairly and adequately protect the interests of the respective sub-classes. The attorneys representing plaintiffs are experienced civil rights and employment discrimination attorneys, and are considered to be experts in employment discrimination law.
14. Defendant has acted and refused to act on grounds generally applicable to the respective sub-classes, thereby making appropriate final injunctive relief with respect to the class as a whole.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

15. All conditions precedent to jurisdiction pursuant to section 706 of Title VII of the Civil Rights Act of 1964, as amended, have been complied with by all plaintiffs to wit: An appropriate charge of employment discrimination has been filed with the Equal Employment Opportunity Commission, and Notification of Right to Sue was received by plaintiffs from the Equal Employment Opportunity Commission.
16. Plaintiffs have filed a timely complaint based on the time limits contained in § 706 of Title VII of the Civil rights Act of 1964, as amended.

FACTUAL STATEMENT

17. Defendant has intentionally pursued and continues to pursue policies and practices that discriminate against Black employees and that deprive or tend to deprive such persons of equal employment opportunities within NGSS and/or its predecessor(s). Defendant has intentionally implemented these policies and practices, among other ways, as follows:
 - (a) By failing to treat Blacks on an equal basis with Whites;
 - (b) By using selection devices for promotions that have an adverse impact on Blacks, are not job related, and have more adverse impact than equally valid alternatives;
 - (c) By allowing disparate treatment to be the order of the day with regard to Black employees;
 - (d) By using evaluation procedures in the consideration of employees for promotions that discriminate against Black employees;
 - (e) For decades defendant has discriminated against Black employees by failing to provide them with equal opportunities for advancement within the company. Black employees are denied promotions despite their qualifications and years on the job. It is not uncommon for a Black employee who has worked at NGSS and/or its predecessor(s) to be denied a promotion in an area where they have worked for twenty years and then be assigned to train the White employee with less seniority who was given the promotion, because of the promoted employee's lack of experience;
 - (f) NGSS and/or its predecessor(s) has maintained a double standard in granting promotions to Black and White employees. Through various practices including cronyism, nepotism, word of mouth recruitment, and insistence on excessive qualifications for Blacks, defendant has restricted access to employment opportunities for Black employees and has maintained a workforce in which the supervisory and management pool is predominately White. Defendant has failed to address a long-standing practice of showing preferential treatment toward Whites with less seniority, experience, and qualifications while passing over qualified Black employees;
 - (g) It is common knowledge among Black employees that when they apply for a job, often the position has been filled long before it was posted as an "available" position. On several occasions, plaintiffs in this situation recount that they have found out about positions where training was required and were never offered the training, while the White employee selected for the position had been secretly trained for it;
 - (h) In other instances, plaintiffs allege that they were discouraged from taking advantage of the training by supervisors who told them they did not need the training. Subsequently, they were denied promotions and

the reason given was that they did not get the training;

- (i) Defendant maintains a discriminatory practice of promoting Black employees and then demoting them at a disproportionate rate when compared to White employees;
- (j) Promotions, duties, and responsibilities for which plaintiffs were at least as well qualified to perform were assigned or transferred to White employees who had less experience than did plaintiffs. Some plaintiffs in this action state that they have been victims of this practice and that many of them who were promoted only kept their supervisory jobs for a short while before they were demoted back to their original title and bumped from the supervisory pool;
- (k) Some of the plaintiffs have been promoted and unjustly demoted repeatedly;
- (l) Other plaintiffs have been demoted and then never promoted again;
- (m) Defendant does not enforce a policy of seniority with regard to promotions. In fact, it is a common practice within NGSS and/or its predecessor(s) for less senior Whites to be promoted over Blacks with more seniority and experience. Defendant permits these discriminatory practices to continue unabated;
- (n) When Black employees complain about the practices, they are targeted for retaliation and harassment. One plaintiff in this action was terminated for allegedly committing an infraction that many other employees have committed in the past. The infraction was so minor that his immediate supervisor or manager "looked the other way." Despite the minor nature of the infraction and the fact that others had committed it, more senior management terminated the employee (a plaintiff in this action). In another incident, another plaintiff in this action allegedly got into a confrontation with another co-worker, who was also the mother of his child. Management did not discipline the woman whom it is alleged initiated the altercation. Instead, management only dismissed the plaintiff;
- (o) By terminating plaintiffs who speak out against the defendant's discriminatory personnel practices, defendant is in violation of Title VII and the Civil Rights Act of 1866;
- (p) Other plaintiffs state they have been the objects of harassment because it is known throughout the company that they are pursuing their statutory rights to protect themselves from discriminatory treatment;
- (q) Other plaintiffs state that they have been transferred from job to job repeatedly in an effort to dissuade them from pursuing their statutory rights to protect themselves from discriminatory treatment;
- (r) Over the course of several years, many of the plaintiffs in this action have complained about the defendant's discriminatory policies and practices. By reason of the defendant's discriminatory and unlawful employment practices described above, the plaintiffs and class members have suffered discrimination, embarrassment, emotional distress, humiliation and indignity. Plaintiffs have been discriminated against by the operation of the offending practices;
- (s) On numerous occasions, plaintiffs have been denied the right to go on sea trials where they would be able to earn substantial amounts of overtime;
- (t) Defendant maintains a practice of workplace segregation where Black employees are assigned to the most dangerous and dirtiest areas of the plant. This kind of "job steering" has resulted in Black employees being denied the opportunity to move out of these less desirable work areas;

- (u) Black employees often end up in dead end jobs with no hope of advancement regardless of their years with NGSS and/or its predecessor(s);
- (v) For more than three decades NGSS and/or its predecessor(s) has perpetuated a racially hostile atmosphere for its Black employees. Every day of their working lives, plaintiffs, and all those similarly situated, are subjected to racial harassment, insults, threats, and, in some cases, physical abuse. For example, they have entered the grounds of NGSS and/or its predecessor(s) and have discovered nooses hanging in conspicuous places, including on United States Navy ships;
- (w) Plaintiffs must use restrooms where racist graffiti embellishes the walls. These conditions confronted Black workers as early as the 1960s when the restrooms were first integrated, and has been a problem ever since, even today. Racist slogans such as “Kill all Niggers. Crime rate will drop 98%” have also been written on walls outside at least one restroom. Indeed, the life-threatening message quoted above appeared on a wall in proximity to the administrative offices at NGSS or and/or its predecessor(s);
- (x) Plaintiffs are continually confronted by racial epithets by persons saying things like “Nigger, this room ain’t for you”(referring to the public break room) and the indiscriminate use of the word “nigger”;
- (y) The continuous use of the term “Nigger” by White employee or managers is a badge or incident of slavery;
- (z) White supervisors and co-workers use nooses as symbolic intimidation. Black workers have been told when they have discovered White workers making nooses that “I’m gonna hang your Black ass tonight.” Others have been subjected to the ominous presence of nooses on their way to their work stations;
- (aa) Recruitment for the Ku Klux Klan openly takes place; indeed, one of the messages that adorned one restroom wall read, “Join your local chapter of the Ku Klux Klan today.” Underneath this message was scrawled, “Which one? There are four.”;
- (bb) Because of the widespread nature of the racial hostility and abuse at NGSS and/or its predecessor(s), plaintiffs, and all those similarly situated, have complained to their supervisors and upper management. NGSS and/or its predecessor(s) has failed to respond to these complaints, and such egregious unlawful conduct continues unabated. Indeed, White supervisors at NGSS and/or its predecessor(s) use the same bathrooms as the Black workers, and therefore, they have viewed the racist graffiti, but they have not seen fit to address this longstanding problem adequately;
- (cc) Because of the historical insouciance exhibited by NGSS and/or its predecessor(s), many Black workers have failed to register complaints regarding this racial hostility thereby adding to the egregious working conditions under which they have attempted to function in their respective work places;
- (dd) Defendant has violated the Thirteenth Amendment to the U.S. Constitution, which was enacted to abolish slavery and all badges or incidents thereof, by maintaining a hostile work environment in which nooses are displayed and racist graffiti covers company walls;
- (ee) Defendant and/or its predecessor(s) have permitted, condoned, and failed to take preventative or corrective action to stop harassment of Black employees at NGSS and/or its predecessor(s). Black employees are demeaned and harassed by White supervisors and other White employees through various means including assignment of job duties, discipline, verbal abuse, and racial slurs. White supervisors’ discretion to respond

(or not) to such matters is unconstrained and is exercised in a manner which discriminates against Black employees. This conduct creates a work environment which is hostile to Black employees, subjects Black employees to severe anxiety, and affects their job performance;

- (ff) Defendant's discriminatory and unlawful employment practices have been repetitive, systematic, and conducted in callous disregard of and in gross indifference to the rights of the plaintiffs and all those similarly situated;
- (gg) For Black employees at NGSS and/or its predecessor(s), the presence of nooses is a constant reminder of the practice of race-based lynching that occurred during and after slavery in the United States. The racist graffiti covering the bathroom walls carries messages of hate and the threat of violence. The acts and practices of the defendant described above constitute a pattern or practice of resistance to Black employees' abilities to fully enjoy their rights to equal employment opportunities at NGSS and/or its predecessor(s). This pattern or practice denies plaintiffs their rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and the Thirteenth Amendment to the U.S. Constitution via the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981;
- (hh) Plaintiffs are informed and believe that defendant has illegally discriminated against Black employees with respect to employment opportunities at NGSS or and/or its predecessor(s) in other ways not yet known. Defendant's discriminatory and unlawful employment practices have been repetitive, systematic, and conducted in callous disregard of and in gross indifference to the rights of the plaintiffs and all those similarly situated;
- (ii) By reason of defendant's discriminatory and unlawful employment practices described above, the plaintiffs, and all those similarly situated, have suffered discrimination, embarrassment, emotional distress, humiliation, and indignity in such a manner as to change their working conditions and to hamper their ability to carry out their job assignments;
- (jj) Plaintiffs have been discriminated against by the operation of the offending practices; as a result, they have suffered injury and loss;
- (kk) With regard to retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981, defendant has acted in reprisal and retaliation when plaintiffs have complained about its discriminatory practices, by, *inter alia*:
 - i. Closing communications to them;
 - ii. Passing over plaintiffs for promotions;
 - iii. Terminating some of the plaintiffs, including constructive termination, discharge, and dismissal;
 - iv. Threatening the financial security of plaintiffs;
 - v. Initiating disparate disciplinary actions against plaintiffs;
 - vi. Threatening plaintiffs' employment; and
 - vii. Making false allegations against plaintiffs;
- (ll) Defendant was aware that its actions with regard to the treatment Black employees endured were in violation of federal statutes prohibiting discrimination on the basis of

race;

(mm) Defendant has maintained a dual employment system that relegates many Black employees to the most undesirable jobs in its shipyard. These areas are the dirtiest and among the most dangerous ones and jobs in these areas are predominantly held by Black employees. Certain plaintiffs recount a time when a ship contaminated with Hepatitis C docked at the defendant's shipyard, and they were assigned to clean it with very little protection afforded them. In addition, they note that Black employees staffed the job. The few White employees who were initially assigned to this dirty task were re-assigned after they complained about the distasteful task;

(nn) The practice of maintaining a segregated workplace and a system of job steering constitutes racial discrimination prohibited by the Thirteenth Amendment; Plaintiffs maintain that the denial of promotions they were qualified for, in favor of Whites who were less senior and arguably less qualified, is a badge or incident of slavery.

DECLARATORY RELIEF ALLEGATIONS

18. Plaintiffs incorporate paragraphs 1 through 17, as though fully set forth herein.
19. A present and actual controversy exists between plaintiffs and defendant concerning their rights and respective duties. Plaintiffs contend that defendant violated plaintiffs' rights under Title VII of the Civil rights Act of 1964, as amended.
20. Plaintiffs are informed and believe, and thereon allege, that defendant denies these allegations. Declaratory relief is therefore necessary and appropriate.
21. Plaintiffs seek a judicial declaration of the rights and duties of the respective parties.

APPROPRIATENESS OF EQUITABLE RELIEF

22. Plaintiffs, and all those similarly situated, will suffer irreparable injury if the declaratory and injunctive relief requested herein is not granted, since defendant will hire employees on the basis of the discriminatory selection procedure described herein. If defendant is not enjoined from engaging in discriminatory employment practices, plaintiffs and members of the class will be deprived of career opportunities as employees, which they otherwise would have been able to pursue, but for defendant's discriminatory employment practices.
23. No plain, adequate, or complete remedy at law is available to plaintiffs and all those similarly situated. The loss of promotional opportunities, experience, and careers with defendant cannot be adequately compensated by monetary relief.
24. Unless restrained by order of this Court, defendant will continue to pursue policies and practices which are the same as, or similar to, those alleged above.

FIRST CLAIM FOR RELIEF

25. Plaintiffs refer to and incorporate by reference the allegations contained in paragraphs 1 through 24 and further allege for a First Claim for Relief as follows:
26. Defendant has intentionally failed to provide plaintiffs, and all those similarly situated, equal employment opportunities by discriminating against them on the basis of race with regard to treatment and promotions at

NGSS and/or its predecessor(s)'s unequal treatment of Black employees. Their intentional failure to remedy such unequal treatment violates plaintiffs' right to equal protection of the laws guaranteed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

SECOND CLAIM FOR RELIEF

27. Plaintiffs refer to and incorporate by reference the allegations contained in paragraphs 1 through 24 and further allege for a Second Claim for Relief as follows:
28. Defendant's failure to provide equal employment opportunities to plaintiffs, and all those similarly situated, by discriminating against them on the basis of race with regard to treatment and promotions at NGSS and/or its predecessor(s) violates their right to be free from such discrimination under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.

THE APPROPRIATENESS OF COMPENSATORY AND PUNITIVE DAMAGES

29. Defendant has caused all plaintiffs emotional distress and mental anguish as a proximate result of their illegal practices, and these plaintiffs are entitled to compensatory damages pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 1981a, as well as the Civil Rights Act of 1866.
30. Similarly, defendant was aware that its actions with regard to all plaintiffs were in violation of federal statutes prohibiting discrimination on the basis of race, and therefore, these plaintiffs are entitled to punitive damages.

PRAYER

31. WHEREFORE, plaintiffs pray that this Court:

- (a) Issue a preliminary and permanent injunction enjoining defendant, its agents, successors, employees, attorneys, and those acting in concert with it from engaging in each of the unlawful practices set forth in paragraphs 1 through 17 and from continuing other practices found to be in violation of applicable law;
- (b) Declare pursuant to 28 U.S.C. §§ 2201, 2202 the employment practices set forth in paragraphs 1 through 17 to be unlawful and in violation of Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1866, and the Thirteenth Amendment to the Constitution of the United States;
- (c) Grant such other and further equitable relief as may be just and proper, including, but not limited to, compensatory seniority, back pay, sick pay, reinstatement, and disability benefits, to plaintiffs and all those similarly situated;
- (d) Grant relief to remedy disparate treatment based on race;
- (e) Grant such punitive, compensatory, and special damages as proved at trial to the plaintiffs in their individual capacities;
- (f) Award plaintiffs the costs and litigation expenses of this action and reasonable attorneys' fees as provided for in section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k); and the Civil Rights Attorneys Fees Award Act of 1976, as amended, 42 U.S.C. § 1988;
- (g) Adjudge, decree, and declare the practices of defendant complained of herein to be violative of the rights secured to all plaintiffs, and all those similarly situated, by the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*;
- (h) Direct defendant to take such affirmative steps as are necessary to ensure that the effects of its unlawful

employment are eliminated;

- (i) Issue a permanent mandatory injunction requiring that defendant adopt employment practices in conformity with the requirements of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*;
- (j) Issue a permanent prohibitory injunction preventing defendant, its agents, managers, supervisors, or employees from engaging in the discriminatory employment practices complained of herein;
- (k) Require defendant to submit a comprehensive plan detailing how it plans to ensure fair and equitable job advancement opportunities for Black employees. The plan should also outline steps to be taken to ensure that jobs remain open until the posting period has past. The plan should support any and all references to seniority considerations as outlined in the Collective Bargaining Agreement. The plan should include an equal opportunity statement that insures that applicants will be judged based on their qualifications and their years of service;
- (l) Require defendant to institute a policy that affords equal opportunities for training and job development. Such training must be announced to the entire workforce and a procedure put in place consisting of a rotation scheme and other procedures to ensure that training for job advancement is afforded to all those who are interested;
- (m) Issue a judgment declaring that the acts and practices of defendant are in violation of the laws of the United States;
- (n) Issue a permanent mandatory injunction requiring defendant to take immediate steps to rid its facility of all signs and symbols of racial harassment, humiliation, and intimidation;
- (o) Issue a permanent injunction enjoining defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of race;
- (p) Issue a permanent mandatory injunction requiring defendant to remove all racially charged graffiti from the bathroom walls and other places throughout its facility and to adopt explicit policies that prohibit the act of writing such messages of hate;
- (q) Require defendant to adopt an explicit policy for disciplining employees who engage in discriminatory acts including but not limited to writing racial epithets on company walls and property, making verbal threats, making and displaying nooses, and committing acts of violence. The policy proscribing such conduct must be published and distributed to all employees;
- (r) Require defendant to hire an outside consultant in the field of diversity and race relations to conduct mandatory trainings with all employees. Such trainings must be mandatory for all employees, including managerial staff, and must begin within 30 days from the issuance of this order;
- (s) Require defendant to develop a written plan for curing the workplace of racial hostility and discrimination. The plan must be submitted to this court and made part of the permanent record outlining the relief to which plaintiffs are entitled, and the plan must be distributed to all employees and used as a basis for diversity and race relations trainings;

- (t) Require defendant to place signs explicitly prohibiting the writing of racially charged and other offensive graffiti on company property and other racist acts, including the making and displaying of nooses;
- (u) Require defendant to establish a special confidential complaint process for victims of workplace racial hostility. The turn-around time for resolution of such complaints will be no more than 5 business days; and
- (v) Issue a permanent injunction:
 - i. Requiring defendant to abolish discrimination on the basis of race and national origin within all areas and departments of its facility;
 - ii. Requiring defendant to refrain from retaliating against plaintiffs or any members of their class or any other employees for making complaints about discriminatory treatment and conduct by defendant;
 - iii. Requiring defendant to appoint an independent monitor to insure fairness and compliance with the orders of this Court;
 - iv. Ordering defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for Blacks and which eradicate the effects of its past and present unlawful employment practices; and
 - v. Entering an order enjoining defendant and its agents and employees from subjecting plaintiffs, and all those similarly situated, to differential treatment, and from taking any further retaliation against plaintiffs, and all those similarly situated, for prior actions, or for bringing this action, and entering an order purging defendant's files of any improper documents relating to actions underlying this amended complaint.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiffs hereby demand a trial by jury.

Dated: March 25, 2003

Respectfully submitted,

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